

Notes on Acts and Laws

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Chapter 7 The Transfer of Property Act

CONTRIBUTION

1. Suppose two properties are mortgaged and they belong to different persons. Suppose for the realisation of the mortgage money only one property is sold and the proceeds are found to be sufficient to pay the amount. The result is that one mortgagor has lost his property while the other gets it back without having to pay any thing.

This is a gross injustice. To remedy this injustice Equity invented the doctrine of Contribution which is embodied in Section 82.

2. According to this Section, the different owners are liable to contribute rateably to the debt secured by the mortgage.

3. For determining the rate at which each should contribute the value therefore shall be taken as the value at the date of the mortgage deducting the amount of mortgage, if any, to which it was subject on that date.

1. The claim for contribution can arise only when the whole of the mortgage debt has been satisfied—*26 All. 407 (426, 27) T.B.*

2. The right to contribution is subject to the rule of marshalling. That is where marshalling comes into conflict with contribution, the rule of marshalling shall prevail—This is the meaning of the last para of Section 82.

WHO CAN CLAIM THE RIGHTS OF THE MORTGAGOR *Section 91.*

WHO CAN CLAIM THE RIGHTS OF THE MORTGAGEE *Section 92.*

Any person *other than the mortgagor* who pays the mortgagee becomes entitled to the rights of the mortgagee.

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Such persons are—

1. Subsequent mortgagee.
2. Surety.
3. Any person having an interest in the property.
4. A co-mortgagor.

5. Any other person with whose money the mortgage has been redeemed if the mortgagor has by a registered deed agreed to this.

This is called the rule of subrogation.

II. DOES THE LAW OF SALE PRESCRIBE ANY PARTICULAR MODE OF TRANSFER ?

1. The Law of Sale of Immovable Property does prescribe a mode of transfer. The mode of transfer is either *Registration* or *Delivery of Possession*.

2. Whether the appropriate mode of transfer in any particular case is Registration or Delivery of Possession depends upon two considerations—

- (i) Whether the immovable property is tangible or intangible.
- (ii) Whether the Immovable Property is worth more than Rs. 100 or is less than Rs. 100.

3. If the property is *Intangible* then the transfer can take place only by registration, no matter what the value of the property is.

4. If the property is *Tangible* property then

- (i) If it is worth more than Rs. 100 then the transfer must be by registration.
- (ii) If it is worth less than Rs. 100 then the transfer may be either by Registration or by delivery of possession.

5. It is clear that in all cases except one. Registration is the only method of effecting a sale. The case where option is given either to register or deliver possession is the case where the property is tangible and is less than Rs. 100 in value.

6. *Registration and Delivery as alternative complimentary modes.*—In this connection the following points may be noted:—

- (i) Where Registration is prescribed as the *only* mode of transfer, delivery of Possession is neither necessary nor enough to complete the transaction of sale.
- (ii) Where delivery of possession is prescribed. Registration is not necessary to complete the sale. However, Registration without delivery will be enough to complete the sale.

7. *No other mode of Transfer.*—The provisions as to modes of transfer are exhaustive and a sale cannot be effected in any other way. Title cannot pass by admission or by recitals in a deed or petitions to officers or entry in the record of rights. Admission that land has been sold, will not operate as an estoppel so as to do, away with the sale for a registered conveyance or delivery. 43 Cal. 790.

8. It is necessary to observe the prescribed modes of transfer—

- (i) Ownership does not pass except by a transfer in the prescribed form.
- (ii) An unregistered deed *is not enough* (a) In cases where Registration is compulsory. (b) Also in cases where the value is less than Rs. 100 and the transfer is not made by delivery.

9. *Meaning of tangible and intangible* (i) Immovable Property is either *tangible* or *intangible*.

- (ii) The distinction between tangible and intangible is analogous to the distinction made in English Law between a corporeal hereditament and

incorporeal hereditament

(iii) A corporeal hereditament is an interest in land in possession i.e. a present right to enjoy the possession of land. An incorporeal hereditament is a right over land in the possession of another, which may be a future right to possession, or a right to use for a special purpose the land in the possession of another e. g. a right of way.

(iv) The contract between tangible and intangible is a contract between the estate of one who is possessed of the land, the tangible thing and that of a man who has the mere right, the intangible thing, without possession of anything tangible.

(v) A thing to be tangible must be capable of actual delivery. *Sulaiman C. J. 50 All. 986.*

10. *Meaning of Delivery of Possession*

(i) Delivery takes place when the seller places the buyer, or such other person as he directs, in possession of the property.

(ii) Delivery is an act which has the effect of putting the buyer in the possession of property.

(iii) What amounts to Possession ? The question remains unanswered. Is it actual possession ? or Is it symbolical possession ?

(iv) One view is that since delivery is prescribed for tangible property only what the Legislature intends is actual possession.

(v) The other view is that it is used in a wider and ordinary sense because in the great majority of cases, land is in the occupation of a tenant or the buyer and physical delivery is therefore impossible.

(vi) The latter view is the generally accepted view, so that there is physical delivery, when the owner of property places the buyer in such relation to the land and its actual occupants as he himself occupies.

11. *Ownership when transferred* (i) Ownership passes upon delivery or registration. (ii) With regard to registration, the following points should be noted:—

(a) Once registration is effected, the title relates back to the date of the execution.

(b) A Registered sale-deed will not be defeated by another deed executed later but registered earlier.

(c) The transfer will not be subject to the *pendens* if the deed was executed before the suit but registered after the suit.

(d) Although it is true that property does not pass i. e. ownership is not transferred until Registration is effected, it is not true to say that property passes as soon as the instrument is registered, for the true test is the intention of the parties.

3. Section 55 (3)— *To deliver title-deeds* :—

1. Title-deeds are accessory to the estate. They pass with the conveyance without being named.

2. This includes *all* deeds relating to the property conveyed in possession as well as in power.

3. The liability to deliver title-deeds also includes the liability to bear the cost of obtaining them.

4. Counterparts leases and Kabulayets are deeds of title accessory to the estate.

5. The duty to deliver title-deeds is not dependent upon the completion of the conveyance. This duty does not arise until the price has been paid.

EXCEPTIONS :

(i) When the seller retains parts of the property comprised in the deeds, he may retain the deeds but is under an obligation for their safe custody and to produce them or give true copies when required.

(ii) When property is sold in different lots—the purchaser of the lot of the *greatest lot* is entitled to the documents—subject to the same obligations as above.

By an express covenant, it may be given to the purchaser of the *largest lot* i.e. in area.

6. The sub-section does not say what is to happen if the sales are at different times.

BUYER'S LIABILITIES

1. BEFORE CONVEYANCE

1. Section 55 (5) (a)—*To disclose facts relating to the interest of the seller in the property materially increasing value.*

1. Every purchaser is bound to observe good faith in all that he says or does in relation to the contract and must abstain from all deceit, whether by suppression of truth or by suggestion of falsehood.

2. The buyer, however, is under no duty to disclose latent advantages as the seller is to disclose latent defects.

3. To this rule, matters of title are an exception. Although the seller's title is ordinarily a matter exclusively within his knowledge, yet there may be cases where the buyer has information which the seller lacks. In such cases he must not make an unfair use of it.

Illustration 1.—Summers vs. Griffiths.

An old woman sold property at an undervalue believing that she could not make out a good title to it while the buyer knew that she could. The sale was set aside.

Illustration 2.—Ellard vs. Llandaff (Lord)

The lessee obtained a renewal of a lease, in consideration of a surrender of the old lease, suppressing the fact (that)* the person on whose life the old lease depended was on his death-bed.

2. Section 55 (5) (6)—*To pay the Price.*

1. The buyer is not bound to pay the price except on a complete conveyance to himself of the whole interest that he has purchased.

2. If the property is sold free from Encumbrances and these are not discharged at the time of conveyance, the buyer is not bound to pay.
3. His remedies for getting rid of Encumbrances are—
 - (i) Under Section 18 (c) of the Specific Relief Act to compel the vendor to discharge them.
 - (ii) He may discharge it himself and set off the amount against purchase money.
 - (iii) Recover it by subsequent suit against the vendor.
4. This sub-section imposes a personal liability on the buyer apart from the liability imposed by Section 55 (4) (b) on the property—52 *All. 901*.

BUYER'S LIABILITIES

II. AFTER CONVEYANCE

1. Section 55 (5) (c)— *To bear loss, etc.*

1. Under sub-section 55 (1) (c) the seller is to bear the loss between Contract and Conveyance.

2. After conveyance the buyer is the owner and the property is at his risk. He must therefore bear the loss.

3. This is different from English Law under which the contract for sale transfers an equitable estate and with it liability for loss or destruction.

4. The seller is liable for waste and if the seller has insured the property, the buyer can compel him to apply it for restoration.

2. Section 55 (5) (d)— *To pay outgoings.*

1. Before conveyance this liability falls upon the seller—55 (1) (g) after conveyance it falls on the buyer— Public charges, Rent, Interest and Encumbrances.

2. The liability is statutory and not merely contractual and therefore it is binding on a minor vendor on whose behalf the property is sold—46 *Mad. L. J. 464*.

3. If property is sold free from Encumbrances, the seller must discharge it. If sold, subject to Encumbrances, then the interest on Encumbrances *upto sale* must also be paid by the buyer—26 *Bom. S. R. 942*.

RIGHTS OF BUYER AND SELLER RIGHTS OF THE SELLER

1. BEFORE CONVEYANCE

1. Section 55 (4) (a)—*To take rents and profits.*

1. Until conveyance, the seller continues to be the owner. Therefore, he has a right to take rents and profits of the property.

II. AFTER CONVEYANCE

1. Section 55 (4) (b)—*To claim charge, on property for price not paid.*

1. If the sale is completed by conveyance and the price or any part of it is

unpaid, the seller has under this sub-section a charge for the price or for the balance.

2. The charge is a non-possessory charge i. e. it does not give a right to retain possession. As the ownership has passed, the charge gives the seller no right to refuse possession—

30 Mad. 524 ; 43 Mad. 712 ; 23 Bom. 525 ; 34 Mad. 543.

3. The charge being on the property, it does not matter if there are several purchasers who had agreed among themselves to pay in a certain proportion.

4. The claim for a charge for unpaid price, not only subsists against the original buyer, but is also available against a transferee *without consideration* or a transferee with notice of non-payment.

5. The charge is not only for the purchase money but also for interest on the purchase money.

6. The right to a charge for interest commences only from the date on which possession has been delivered. The right to include interest for the purposes of a charge on the property *before* possession has been delivered depends upon the equities and circumstances of the case.

Illustration.—If the purchaser retains part of the purchase money as security for the seller discharging an Encumbrance, he is not liable to pay interest.

7. English and Indian Law.

(i) Under the English Law the seller has a lien from the date of the Contract.

(ii) Under the Indian Law the charge begins from the date of the conveyance.

(iii) The reasons for this difference :—

(a) Under the English Law, the seller parts with the estate as a result of the contract.

(b) Under the Indian Law, the seller parts with it as a result of conveyance.

(c) The result is the same, for both give the right to proceed against the property. The only difference is that the English lien being equitable, can be moulded by equity to suit circumstances. While the Indian charge being statutory, is rigid and must conform to the terms of the statute.

BUYER'S RIGHTS

1. BEFORE CONVEYANCE

1. Section 55 (6) (b)—*To claim a charge on the property for purchase money paid before conveyance.*

1. The clause as worded makes no sense. It is in two parts. If the clause " unless he has improperly declined to take delivery " which is negatively put was put positively to read " if he has properly declined " then there is no distinction between the two clauses.

2. But there is a distinction between the two parts which is a distinction arising from burden of proof. Under the first part, the purchaser is entitled to

certain rights which he can enforce " unless he has improperly declined to take delivery " which means that he is to lose those rights if the seller proves that he, the purchaser, has improperly declined to accept delivery. Under the second part of the clause, the purchaser gets certain additional rights which he can claim, only if, he can show that " he has properly declined to take delivery " and the burden of showing it will be upon him.

3. Under this clause, a buyer has a right to a charge for three things:—

- (i) for the amount of purchase money properly paid,
- (ii) for the earnest if any,
- (iii) for the costs awarded to him.

4. *Charge for Purchase money paid.*

1. This charge attaches from the moment the buyer pays any part of the purchase money.

2. Charge for purchase money is lost *only* when the seller proves that the buyer has improperly declined to take delivery. The burden of proof is upon the seller.

5. *Charge for earnest and cost.*

(1) There is a possibility for a charge in respect of these two. But this possibility will be realised only if the buyer proves that he has properly declined to take delivery. The burden of proof is upon the buyer.

6. *Earnest and Part Payment of Purchase money.*

(1) What is stated above about charge in respect of earnest applies only if the money paid is paid as earnest.

(2) Money paid by a buyer before conveyance serves two purposes : (1) It goes in part payment of the purchase money for which it is deposited. (2) It is security for the performance of the contract. In the latter case it is earnest. In the former case it is instalment.

(3) This difference is important because whether there would be a charge or personal liability or there would not be, would depend upon whether the payment made is *Instalment or Earnest*.

(i) If it is earnest—There is no charge (except in the case of a buyer who proves that he has properly declined to take delivery). Earnest is wholly lost and there is not only no charge but there is even no personal liability.

(ii) If it is part payment—There is a charge unless seller shows that the buyer has improperly refused to take delivery. Part payment is never wholly lost. If it fails to create a charge, it remains as a personal liability of the seller.

(4) Whether it is part payment or earnest is matter of contract or intention.

7. The purchaser's charge can be enforced against the seller and all persons claiming under him.

8. (1) The buyer loses his charge :—

- (i) By his own subsequent default
- (ii) By his improperly refusing to take delivery.

- (2) Earnest money—There are two purposes underlining Earnest:—
- (i) It goes in part payment of the purchase money.
 - (ii) It is a security for the performance of the contract. It becomes part of the purchase money if the contract goes through. It is forfeited, if the contract falls through by reason of the fault or failure of the purchaser.

II. AFTER CONVEYANCE

1. Section 55 (6) (a)—*To claim increment*. 1. This must be so, because, after conveyance he is the owner.

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Sales free Encumbrances

1. As far as possible, a sale ought to be free from Encumbrances. To provide sales being made free from Encumbrances T. P. Act contains two sections which make it possible. They are Section 56 and Section 57.

SECTION I

THE NATURE OF A MORTGAGE

1. DEFINITION.

1. Section 58 defines what is a mortgage. According to the section, there are three ingredients of a mortgage transaction :—

- (i) The transfer of interest.
- (ii) In specific immovable property.
- (iii) For the purpose of securing the payment of money advanced by way of a loan.

II. EXPLANATION OF THESE INGREDIENTS.

(i) Immovable property is not an essential ingredient of mortgage:

(1) Under the English Law, all kinds of property, personal or real, can be made the subject of a mortgage. The Real estate may be corporeal or incorporeal and the personal estate may be in possession or in action. The Estate may be absolute or determinable i. e. for life : it may be legal or equitable. Not only any kind of property may be the subject-matter of a mortgage but any interest in it may be mortgaged, whether such interest is vested, expectant or contingent.

(2) The Transfer of Property speaks only of immovable property in relation to mortgages. This gives the impression that the law does not recognise the mortgage of a movable property. This would be a mistake. The Transfer of Property Act merely *defines* and *amends* the law relating to property. It does not consolidate the law. It is, therefore, not a complete or exhaustive code of law relating to mortgage.

(1) Mortgages of movables are recognised in India.

9 C. W. N. 14 : 8 Bom. S. R. 344.

(4) *Law by which mortgages of movables are governed.*

The Transfer of Property Act makes no provision: The Indian Contract Act makes no provision. Consequently the principles of English Law will

be applicable to such mortgages.

34 Cal. 223 (228): 27 Bom. S. R. 1449.

(5) Mortgage of movable property may be effected without writing.

(6) Mortgage of an actionable claim—in writing—though movable by reason of Section 130 T. P.—*37 Bom. 198. (P. C.)* Deposit of insurance policy.

(ii) Transfer of an Interest :

1. It means the transfer of *some* right belonging to the mortgagor in respect of the property.

2. Ownership consists of a bundle of rights, such as, right to possess, right to enjoy, sell, etc.

3. It is enough if one of these rights is transferred. The right transferred may vary :— (i) It may be the right to sell. (ii) It may be the right to enjoy. (iii) It may be the right to own.

4. The nature of the right transferred is matter of no consequence so long as some right is transferred.

III. THE PURPOSE MUST BE SECURING THE PAYMENT OF MONEY ADVANCED.

1. The transfer of interest is by way of *Security*. The idea of a Security involves two things. There must be a debt or pecuniary liability and secondly there must be some property pledged for the meeting of that liability.

1. The purpose of the transfer must be securing of the debt. A transfer made for the purpose of securing a debt must be distinguished from a transfer, the purpose of which is to discharge a debt.

25 All. 115=30 I. A. 54.

II Bom. 462.

3. The right transferred must be to enable the man to recover the debt. The transfer must not extinguish the debt. If the effect of the transfer is to extinguish the debt then there is no mortgage.

Illustration.—

II Bom. 462 Abdulbhai vs. Kashi

In 1862, A in consideration of Rs. 150 passed to B a writing called *Karz Rokha* (or debt-note). It proved (*inter alia*) that B should hold and enjoy a certain piece of land belonging to A for twenty years, that at the end the land should be restored to A free from all claims in respect of principal or interest.

Held, not a mortgage.

25 All. 115.

MORTGAGE COMPARED WITH OTHER FORMS OF ALIENATIONS MORTGAGE AND SALE

1. Sale is defined in Section 54—It is a transfer of ownership for a price. The price is not a loan and the transfer is not a transfer of an interest but is an

absolute transfer of ownership.

2. In a mortgage, the money paid is a loan and the transfer is a transfer of an interest only.

3. In a breach of a contract of sale, the rights are the rights of a vendor and purchaser while the contract is a contract of mortgage the rights are those of a mortgagor and mortgagee.

4. In sale, the property is transferred absolutely. In mortgage, the property serves only as a security for the repayment of a debt.

MORTGAGE AND OTHER KINDS OF SECURITIES

1. There are four kinds of securities (1) mortgage, (2) pledge, (3) lien and (4) hypothecation or charge.

It is important to note the distinction between mortgage and other kinds of securities.

1. MORTGAGE AND PLEDGE

1. The bailment of good as security for payment of debt or performance of a promise is called a 'pledge' —*Section 172 Indian Contract Act.*

2. In a mortgage, general ownership in the property passes to the mortgagee and the mortgagor has only a right to redeem. In a pledge, 'only' a qualified or special property 'passes to the pledgee, the general ownership remains in the pledger.

3. Delivery of possession of the property pledged to the pledgee is essential. But delivery of possession is not essential to a mortgage.

4. The property which is once pledged cannot be pledged a second time, because, no possession can be granted to the second pledgee, while property which is mortgaged once to one person can be mortgaged again to others subsequently.

5. Pledge can only be of *personal* property. Mortgage can be of both personal as well as real property.

Mortgage and Liens

1. A lien is a kind of security which is created by the operation of the law. Lien is a right created by law and not by contract to retain possession of the property belonging to another until certain demands are satisfied.

2. The law on the subject of lien is scattered in many statutes of the Indian Legislature. E. g. Contract Act Sections 170-General-171-Bankers Solicitors, etc., 221-Agent's lien. Sale of goods 47, unpaid Vendor's lien. T. P. 554 : 55 (6) seller's and buyer's lien.

3. Lien does not create general ownership as a mortgage does, not even qualified property as in a pledge—only right to retain possession.

4. Both mortgagee and pledgee can sell: but lien holder cannot.

Mortgage and a charge

1. A charge is defined in Section 100. There are two elements in a charge:

(1) There is a pecuniary liability.

(2) Immovable property is made security for the discharge of that

pecuniary liability.

2. In a mortgage there are three elements :— (i) There is pecuniary liability.
(ii) Immovable property is made security for the discharge of that pecuniary liability.
(iii) There is a transfer of an interest in that property in favour of the creditor.
3. In a charge there is no transfer of interest. There is only burden.
*35 Cal. 837 (844) ;
13 Lah. 660 T. B.
35 Cal. 985.*
4. The difference between mortgage and charge is material.

1. A mortgagee can follow the mortgaged property in the hands of any transferee from the mortgagor. While a charge can be enforced only against transferee with notice—

33 Cal. 985.

§ DIFFERENT CLASSES OF MORTGAGE

1. The section enumerates six classes of mortgage :—
 - (i) Simple mortgage.
 - (ii) Mortgage by conditional sale.
 - (iii) Unsufructuary mortgage.
 - (iv) English mortgage.
 - (v) Equitable mortgage.
 - (vi) Anomalous mortgage.

2. Characteristics of the different classes of mortgage.

(i) Simple Mortgage

1. A Simple mortgage involves two things :
 - (i) A personal obligation, express or implied, to pay.
 - (ii) The transfer of a right to cause the property to be sold.

Personal obligation

1. When a person accepts a loan, there is involved a personal liability to pay, unless there is a covenant to pay out of a particular fund.

10 Cal. 740; 22 Cal. 434; 16 Cal. 540, 13 Mad. 192; 15 Mad. 304 ; 27 Mad. 526 : 86.

1. A loan may be a secured loan or unsecured loan.
2. Every unsecured loan involves a personal obligation to pay.

441. A. 87.

3. The only case of a loan in which a personal obligation to pay is negated, is where there is a covenant to pay out of a particular fund.

Cases. 10 Cal. 740 ; 22 Cal. 434 ; 16 Cal. 540 ; 13 Mad. 192 15 Mad, 304 ; 27 Mad. 526 : 86.

4. Whether a loan, for which there is security, involves a personal obligation to pay is a question of construction. Two propositions may be stated as those of law :—

(i) Personal liability is not displaced by the mere fact that security is given for the repayment of the loan with interest.

(ii) The nature and terms of security may negative any personal liability on the part of the borrower.

5. In a simple mortgage, there is always security given for the loan. The loan is a secured loan. But nature and terms of the security must not negative the personal liability of the mortgagor. A personal covenant to pay is implied in and is an essential part of every simple mortgage.

Cases. 22 All. 453 (461) ; 29 Mad. 491 ; 30 All. 388.

6. In the absence of such a covenant, the security would be a mere charge.

Cases. 42 All. 158 (164)=46 1. A. 228; 52 All. 901.

II. Right to cause the property to be sold.

1. This is a right in rem although it can only be enforced by the intervention of the Court, as the words, ' cause to be sold ' indicate.

2. The transfer of this right may be express or it may be implied.

(ii) Mortgage by Conditional Sale

1. Characteristics.

(1) The transfer is by way of sale. It is a transfer of ownership.

(2) The difference between sale and mortgage by conditional sale is that, in sale the transfer is absolute while in mortgage by conditional sale, it is not absolute but is subject to a condition.

(3) The condition may take three forms :—

(i) That on default of payment of mortgage money *on a certain day*, the sale shall become absolute.

(ii) Then on such payment being made, the sale shall become void.

(iii) (iii) That on such payment being made, the buyer shall transfer such property to the seller.

2. A mortgage by conditional sale and a sale with a condition of repurchase have a very close resemblance. In both cases, there is a right of reconveyance :—

(1) But they are different in the nature of the terms on which the right to reconvey can be exercised vary.

(2) If it is a sale with a condition of repurchase then :— (i) The right is personal and cannot be transferred.

(ii) The right can be enforced on strict compliance with the terms laid down by the condition of repurchase.

Cases. 10 Cal. 30 ; 6 All. 37 ; 21 Bom. 528.

(3) If it is a mortgage by conditional sale, then—

(i) The right to reconveyance is not personal but is a right in term and can be exercised by the transferee.

(ii) Time will not be treated as of the essence.

3. *What is it that distinguishes sale with a condition of repurchase and mortgage by conditional sale ?*

(1) In a mortgage by conditional sale, the transaction notwithstanding the form, remains a lending and borrowing transaction. The transfer of land, although it is in the form of a sale, in fact it is a transfer by way of security.

(2) In a sale with a condition of repurchase, the transaction is not a lending and borrowing arrangement. It is not a transfer of an interest. It is a transfer of all rights. It is not a transfer by way of security. It is an absolute transfer reserving only a personal right of repurchase.

What is the test for determining whether a transaction is a mortgage ?

(1) No particular words or form of conveyance are necessary to constitute a mortgage. As a general rule, subject to very few exceptions, where a transfer of an estate is *originally* intended as a security for money, it is a mortgage and where it is not so originally intended, it is not a mortgage.

(1) It is not the *name* given to a contract by the parties that determines the nature of the transaction. A document may be held to be a sale although it is called a mortgage by the parties.

2 Bom. 113.

(2) It is the jural relation, constituted by it, that will determine whether the transaction is a mortgage or not.

2 Bom. 462.

4. *How to find what the intention of the parties was ?*

By finding out how they have treated the money advanced ? If they have treated it as a debt, then it is mortgage. The criteria adopted by the Courts are—

(i) The existence of a debt

(ii) The period of repayment, a short period being indicative of a sale and a long period of a mortgage.

(iii) The continuance of the mortgagor in possession indicates a mortgage.

(iv) The price below a true value indicates a mortgage.

In applying these tests, the Courts put the onus on the party alleging that an ostensible sale-deed was a mortgage, and in a case of ambiguity, lean to the construction of a mortgage.

5. *Is oral evidence of intention admissible ?*

1. Before the Indian Evidence Act was passed, oral evidence and other instruments were freely admitted to prove this intention. But this practice was condemned by the Privy Council.

2. After the passing of the Indian Evidence Act, the question was governed by Section 92.

3. Section 92 excludes oral evidence to contradict a written document. The Indian Courts, never the less, on the authority of *Lincoln vs. Wright (1859) 4 De G. & J. 16* admitted evidence of acts and conduct of parties to show, that a deed which purported to be an absolute conveyance was intended to operate as a mortgage.

4. In 1899, the Privy Council definitely ruled in *Balkishen v/s. Legge= 22 All. 149 =27/. A. 58.* that the rule in *Lincoln vs. Wright* had no application in India.

5. The result is that, the Courts are definitely limited to the document itself in order to ascertain the intention of the parties.

The question is not what the parties meant, but what is the meaning of the words they used.

Importance of the Proviso.

1. The condition must be embodied in the same document.

Points to be noted.

1. Only means that in determining the question if the condition is contained in another document Court cannot take into consideration in determining intention.

2. But, even if, it was contained in the same document, it is necessarily a mortgage by conditional sale and not a sale with the condition of repurchase.

3. The question of construction still remains.

(iii) Unusufructuary Mortgage

1. CHARACTERISTICS.

(i) Delivery of possession or undertaking to deliver possession.

(ii) Authority to retain such possession until payment of mortgage-money.

(iii) Authority to receive the rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money.

NOTE.—There is no personal obligation to pay.

(iv) English Mortgage

I. CHARACTERISTICS

(i) There is a personal obligation to repay by the mortgagor on a certain day.

(ii) The transfer of the mortgagee is *absolute*.

(iii) The transfer is subject to the proviso that the mortgagee shall reconvey the property on payment.

II. This closely resembles the conditional mortgage. *Difference.*

(i) In the English Mortgage the sale is absolute while in the mortgage by conditional sale the sale is *ostensible*.

Query. How can it be a mortgage if the sale is absolute ? This seems to conflict with the definition of mortgage which is transfer of an interest.

Difference in practice merely means this: that in English Mortgage, the mortgagee is entitled to immediate possession. While in the case of a mortgage by conditional sale, the right to possession depends upon the terms

of the mortgage.

(2) In English Mortgage, there is a personal obligation to pay. In a conditional mortgage, there is no such right.

REQUISITES OF A MORTGAGE BY DEPOSIT OF TITLE DEEDS.

1. *Debt.*

1. A debt has been defined as a sum of money due now even though payable in the future, and recoverable by action—(7922) 2 *K.B.*599 (617).

NOTE.—AS to difference between a debt due by statute and debt due by contract—(1922) 2 *K. B.* 37. There is no necessity of a promise to pay in order to render the money recoverable when the debt is a statutory debt.

2. The debt may be an existing debt or a future debt. The deposit may be to cover a present as well as future advances—50

1. A. 283 ; 17 All. 252 ; 17 All. 252 ;25 Cal. 611.

3. The debt may be a general balance that might be due on an account.

2 Mad. 239 P. C.

I. DEPOSIT OF TITLE DEEDS.

(i) **Title deeds**

1. It has been held in England that it is sufficient if the deeds deposited *bona fide* relate to the property or are *material evidence of title*, and that, it is not necessary that all the deeds should be deposited. (1872) 8 *Ch. App.* 155.

2. These cases have been followed in India. 59 *Cal.* 7 81.

3. But Page *c.f.* in 11 *Rang* 239 F. B. held that the documents must not only relate to the property but must also be such as to show a *prima facie* or apparent title in the depositor.

4. If the documents show no kind of title, no mortgage is created—Tax receipt—Plan—not documents of title.

5. If the deeds are lost, copies may be deposited.

(ii) If the deeds are already deposited by way of mortgage, they can, by oral agreement, be made a security for further advance. It is not necessary that they should be handed back and redeposited.

17 All. 252.

25 Cal. 611.

III. INTENTION.

1. The intention that the title-deeds shall be the security for the debt is the essence of the transaction.

2. Mere possession is not enough without evidence as to the manner in which the possession originated so that a contract may be inferred.

23 1. A. 106; 38 Bom. 372.

1 Rang. 545.

3. If it is in contemplation of the parties to have a legal mortgage prepared and if the title-deeds are deposited for that purpose *only*, the deposit does not create an equitable mortgage.

4. But although the deposit is for the purpose of the preparations of a legal

mortgage, there may also be an intention to give an immediate security, in which case the deposit creates an equitable mortgage.

5. The question is whether mere possession *coupled with debt* does not raise an inference that it is a mortgage? There is a difference of opinion but the better opinion seems to be as between creditor and debtor possession coupled with debt raises a presumption in favour of a mortgage.

IV. TERRITORIAL RESTRICTIONS.

1. This kind of equitable mortgages can be created only in certain towns.

2. The question is, to what does the restriction refer? Does it to the place where the deeds are delivered? or does not refer to the place where the property mortgaged is situated? It is held that the restriction refers to the place where the deeds are delivered and not to the situation of the property mortgaged.

Cases. 14 All. 238. 231. A. 106.

It is not necessary for the property to be situated in the towns mentioned.

(vi) Anomalous Mortgages

1. Any mortgage, other than those specified, is called an anomalous mortgage. It is a mortgage which does not fall within any of the other five classes enumerated.

2. Anomalous mortgages take innumerable forms moulded either by custom or the caprice of the creditor—some are combinations of the simple forms—others are customary mortgages prevalent in particular districts, and to these special incidents are attached by local usage.

What is it that distinguishes different kinds of mortgage.

It is the nature of the right transferred which distinguishes the mortgage.

(1) In a simple mortgage, what is transferred is a power of sale which is one of the component rights that make up the aggregate of ownership.

(2) In a usufructuary mortgage, what is transferred is a right of possession and enjoyment of the usufruct.

(3) In a conditional mortgage and in an English mortgage, the right transferred is a right of ownership subject to a condition.

(4) In a simple mortgage and English mortgage, there is a personal obligation to pay.

(5) In an usufructuary mortgage and mortgage by conditional sale, there is no personal obligation to pay.

What is it that is common to all mortgages.

1. A mortgage is a transfer of an interest in specific immovable property as security for the repayment of a debt.

2. The existence of a debt is therefore a common characteristic.

3. It is said that this cannot be so because in a conditional mortgage or in an usufructuary mortgage there is no personal covenant to pay.

4. The reply to this is, a debt does not cease to be a debt. The remedy of an action for debt does not exist. The remedies for the recovery of debt may

differ without the transaction ceasing to be a transaction for debt.

An ordinary mortgage of land may be viewed in two different aspects:

(1) Regarded as a promise by the debtor to repay the loan, it is a contract creating a personal obligation.

(2) It is also a conveyance, because it passes to the creditor a real right in the property pledged to him.

Out of this double aspect, many questions arise.

Q. I.—By what law the validity of a mortgage of land situated abroad should be governed ?

It is now settled that it is governed by the law of *situs*, and no distinction is recognised between an actual transfer and a mere executory contract.

Q. II.—What is the *situs* of the secured debt—Is the debt to be regarded as situated in the country where the debtor resides, or where the land on which it is secured is situated ?

The Privy Council says " It is idle to say that a debt covered by a security is in the same position with one depending solely on the personal obligation of the debtor " .

III

REQUISITES OF A VALID MORTGAGE

This requires the consideration of the following topics :

- I. Formalities with which a mortgage must be executed.
- II. The proper subject-matters of a mortgage.
- III. The capacity to give and to accept a mortgage.
- IV. Contents of a mortgage-deed.

I FORMALITIES WITH WHICH IT MUST BE EXECUTED

Section 59.—

1. Except in the case of mortgage by a deposit of title-deeds, every mortgage created securing the repayment of Rs. 100 or more as principal money must, under the T. P. Act, be effected by a registered instrument, signed by the mortgagor and attested by at least two witnesses.

2. Where the principal money is less than Rs. 100, a mortgage may be created either by such an instrument or except in the case of simple mortgage by delivery of possession of the mortgaged property.

3. If the principal is Above Rs. 100, the transaction of mortgage must be in writing i.e. it must be by a deed and the deed must be:—

- (1) Signed by the mortgagor.
- (2) Attested by at least two witnesses.
- (3) Registered.

4. If it is less than Rs. 100 no writing is necessary. Parol agreement is enough in the case of :—

- (1) Simple mortgage.
- (2) Conditional mortgage.
- (3) English mortgage.

(4) Usufructuary mortgage.
Parol agreement plus transfer of possession.

4. We have only to consider mortgages where the principal is above Rs. 100.

(1) § SIGNATURE

General Clauses Act 1897. Section 3 (52).

1. The signature may be made by means of types or by a facsimile. 25 *Cal. 911*. Such person having a name stamp used by servant.

2. It may be the mark of an illiterate person. 41 *Bom. 384* mark of a dagger.

3. But a literate person cannot sign by making a mark. Confession not signed the accused was literate. 32 *Cal. 550*.

Signature includes a mark in the case of a person unable to write his name.

(2) § ATTESTATION

1. *Attestation*.—To attest means to bear witness to, affirm the truth or genuineness of, to testify, certify. *Attestation* means the verification of the execution of a deed or will by the signature in the presence of witnesses. Attesting witness is a witness who signs in verification.

2. That being so question is, must the attesting witness be present at the execution of the instrument or a mere acknowledgement of execution by the mortgagor to a witness who afterwards subscribes his name is enough to satisfy the requirements of law in respect of attestation ?

3. The Privy Council has laid down that the attesting witness ought to be present at the execution of the instrument and a mere acknowledgement will not suffice.

39 I.A. 218 ; 35 Mad. 607 which overrule the Allahabad and Bombay decisions to the contrary—27 *Bom. 91* and 26 *All. 69*.

§ ATTESTATION OF PARDANASHINS.

4. The same rule was applied. The signature of the Pardanashin lady must be in the presence of the witness otherwise he cannot be said to be an attesting witness.

Case Law. 451. A. 94.

A mortgage-deed for over Rs. 100 purported to be signed by a Pardanashin lady on behalf of her son, a minor and to be attested by two witnesses. It appeared from the evidence that the lady was behind the parda when the deed was taken to her for signature. The witnesses did not see her sign it, but her son came from behind the parda and told them that it had been signed by his mother; they thereupon added their signatures as

witnesses :—

Held that the deed was not " attested " within the meaning of section 59 of the T. P. Act.

42 1. A. 163

A mortgage-deed purported to be executed by two pardanashin ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that although they could not see the faces of the executants, they heard them speak and recognised their voices :—

Held that the deed was duly attested in accordance with the T. P. Act.

5. The Law is now changed and attestation on acknowledgement of his signature by the executant is good—See Definition *Attested* in section 3, T. P. Act as amended in 1926.

(3) § REGISTERED

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* * *

(Earlier portion not found—ed.) to operate immediately, it is not necessary that there should be a formal delivery or even that the document should go out of the possession of the party who executes it.

illus—Exton vs. Scott. (1833) 6 Simons 31.

A certain person having received moneys belonging to another without any communication with him executed in his favour a mortgage for the amount. The mortgagor retained the deed in his custody for several years and then died an insolvent. After his death the document was discovered in a chest containing his title-deed. It was contended that there was no binding mortgage, because there had been no delivery of the deed. But the contention is overruled, on the ground that there was no evidence to show that the deed was not intended to operate from the moment of its execution.

6. There seems to be an idea that if the deed is delivered to the other party, it must have immediate operation and *cannot* in point of law be delayed in its operation. But it is now established that evidence is admissible to show the character in which the deed is delivered to a person though he is himself a party taking under it and not a stranger. (1897) 2 Ch. 608.

7. Where an instrument is to come into operation, not immediately, but only upon the performance of some condition, it is known as an escrow which simply means a scrawl, or writing, that is not to take effect till a condition precedent is performed.

8. Mere execution is not enough. There must be intention to give it immediate effect. Delivery means an intention to give immediate effect. That intention is independent of the process of delivery or non-delivery.

9. Where a document intended to be executed by one or some only and others refuse to complete it the question whether it is binding on those who have executed it, is one of the intention of the parties to be gathered from the

facts of each.

§ MATERIAL ALTERATION IN A DEED—EFFECT OF

1. A material alteration in a deed made *without* the consent of the mortgagor and with the privity and knowledge of the person who relies upon it, would altogether destroy the efficacy of the deed.

2. If blanks are left to be filled up with merely formal matters the mortgagee may fill them up without imperilling his rights.

(1905) 2 Ch. 455.

2. The question what constitutes a material alteration within the meaning of the rule has given rise to some difference of opinion.

10 C. W. N. 788 (of Mukerji J.)

Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material change, or technically, *an alteration*, and such a change will invalidate the instrument against all parties not consenting to the change.

An addition of a party to a contract constitutes a material alteration.

§ IMPORTANCE OF THE THREE FORMALITIES

1. The absence of any of three formalities is fatal to the validity of the transaction. The word is *only*.

2. Not only the formalities must exist but they must be valid, i. e., in accordance with law.

3. Not only must there be signature but the signature must be valid.

4. Not only must there be attestation but the attestation must be valid. If attestation is invalid, the deed cannot operate as a mortgage—e. g. attestation without the presence or acknowledgement by the executor.

5. Not only must there be registration but the registration must be valid. Thus

(i) If the property is so incorrectly described that it cannot be identified—
18 Cal. 556/4.B.

(ii) When the deed is registered in a circle in which the property is not situate.

29 Cal. 654.

(iii) Where the deed is not presented for registration by the proper person the mortgage is invalid.

581. A. 58

Two other questions have to be considered in connection with the subject-matter of Formalities.

I IS EXECUTION OF THE DEED ENOUGH TO GIVE EFFECT TO THE MORTGAGE ?

1. It is hardly necessary to state that the mere execution of a deed is not enough if it is not intended to operate as a binding agreement.

2. This is expressed in English Law by the formula that a deed must be delivered.

3. This may not be clear unless one understands what meant by 'delivered'. There is nothing mysterious about the delivery of a deed which does not represent any technical process, but only indicates that the instrument is to come into immediate operation.

4. Shephard in his *Touchstone* speaks of *delivery* as one of the requisites of a good deed and adds that it is a question of fact for the jury.

CASE LAW

I. SUIT AGAINST SECRETARY OF STATE

(1906) I **K.B.** 613; 5 *Luc.* 157; 37*Mad.* 55.

II. POSITION OF THE CROWN

1920A.C.508 ; 1932A.C.28 ; 1929A.C.285 ; 8*App.cases* 767 ; 8 *M. I. A.* 500 ; 1903 *App. cases* 501.

III. PARAMOUNTCY

(1792) 2 *Ves.* 60 ; 13 *M. P. C. C.* 22 ; (1906) I *K. B.* 613.

British India = Section 3(17) General Clauses Act, 1897. Whole of British India = includes the Scheduled Districts. 52 *Mad.* 1.

Any newly acquired territory becomes an annexation part of British India—*Onsley vs. Plowden* (1856—59) I *Bom.* 145.

But it retains its laws until altered by the Crown or Legislature. 19 *Bom.* 680 (686) following I *M.I. A.* 175/271.

Acts such as Stamp Act passed by the Indian Legislature have been extended to many places which though outside British India are under British Administration (e. g. Bangalore, Hyderabad assigned districts: Baroda cantonment: Mount Abu, etc.) by notifications under Sections 4 and 5 of the Foreign Jurisdiction and Extradition Act, 1879, and the Indian (Foreign Jurisdiction) Order in Council, 1902.

§ CAPACITY TO GIVE OR TAKE A MORTGAGE

1. A mortgage is a *transfer of property* and also a contract. It must therefore satisfy the requirements as to capacity laid down for a valid transfer of property and for a valid contract.

§ REQUIREMENTS AS TO CAPACITY FOR A VALID TRANSFER OF PROPERTY

1. Transfer of property means an act by which a living person conveys property to one or more other living persons or to himself or to himself and one or more other living persons —Section 5.

2. A mortgage being an act of transfer of property, the parties to an act must be living persons.

3. When it is said that both persons must be living it is obvious that the intention is to make two distinctions :—

(i) Between a transfer *inter vivos* and a will. (ii) Between a transfer and the creation of an interest (Sections 13, 14, 16 and 20).

4. A will operates from the *death* of the testator. A mortgage therefore cannot be created by a will. It must be created *inter vivos*. A will does not operate as a transaction between two living persons.

5. A mortgage is a transfer of an interest. Sections 13, 14, 16—20 permit that an interest may be created in favour of a person not in existence at the date of transfer. But a mortgage is not the creation of an interest, but it is the *transfer* of an interest.

§ Living.

1. What is the meaning of the word *Living* ? Does it mean one who has not suffered natural death or does it mean that a person has not suffered civil death ? There may be no natural death although there may be civil death.

Illus. Sannyasi—Buddhist.

Where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to civil death.

Illus.

Sannyasi—*Mulla.p.113*. Buddhist Monk—7. *Rang. 677. 1. B.*

2. A person who is civilly dead is not dead for the purpose of the T. P. Act.

3. *Living* as defined in explanation 3 to Section 299, I. P. C. would indicate that some part of its body must have been brought forth. But under the Hindu Law a son conceived is equal to son born—*Mulla p. 319*. A person may be living for the purpose of the Hindu Law and may not be for the purpose of T. P. Act.

*16 Mad. 76 ; 37 All. 162 ; 58 Mad. 886. **

4. Another case of a person in a like position is that of a convict. A convict under the English Law, since he cannot enter into a contract or dispose of property, has no power to lend or borrow money on mortgage ; but the administrator of a convict may mortgage any part of the convict's property.

A convict is defined in Section 6 of the Forfeiture Act *33 and 34 Vict. Ch. 23, 1870* : to mean any person against whom judgement of death, or of penal servitude, shall have been pronounced or recorded by any Court of competent jurisdiction in England, Wales or Ireland upon any charge of treason or felony.

3. What about the position of a convict in India.

* (Page left blank in the Ms—ed.)

§ PERSON

1. The word " person " according to the General Clauses Act includes any company or association or body of individuals whether incorporated or not.

2. That the word person includes a " juristic person " such as a corporation was a long established view. But it is now made clear by a special proviso which was added to Section 5 of the T. P. Act in 1929.

3. A corporation, which has power to acquire and hold land has also

impliedly power to mortgage it for purposes of carrying out the object for which it was created. The powers of statutory corporations are generally speaking regulated by the act of incorporation, but where borrowing is necessary for the purposes of the corporation, it is not forbidden by the T. P. Act because it is a " person ".

4. By Hindu Law an *Idol* is recognised as a juristic person capable of holding property. 311. A. 203.

But the possession and management of the property of the *idol* are vested in the *Sebit*. But as the ownership belonged to the *idol* and as the *idol* is a juristic person and therefore a living person, it can be a party to the mortgage.

§ REQUIREMENTS AS TO CAPACITY FOR CONTRACT

1. This is dealt with in Section 7. Two things are necessary under section?
 - (i) Person must be competent to contract
 - (ii) Person must be entitled to transferable property or authorised to dispose of transferable property.

(i) § COMPETENT TO CONTRACT

1. Section 4 says that the Chapters and Sections of the T. P. Act which relate to contracts shall be taken as part of the Indian Contract Act.

2. Competency to contract must therefore mean competency in accordance with the Contract Act.

Section 11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

3. Disqualification of an Insolvent.

A word may be said as to the capacity of an Insolvent to deal with any property subsequently acquired by him. Now it is settled Law that an insolvent, who has not received his final discharge, cannot create a mortgage on immovable property acquired by him. *17 Mad. 21 (But See 8 Cal. 556)*.

§ ENTITLED

1. The question is whether *entitled* means entitled as a full owner or as a limited owner.

2. That a full owner has the capacity to mortgage is obvious. The question is whether a limited owner has the capacity to mortgage ?

3. Person holding property on trust for sale without express power to mortgage.

It may be laid down generally that a trust for sale containing a direction for absolute conversion does not authorise a mortgage.

4. *Partner*—can mortgage partnership property to secure partnership debt.

5. An executor or administrator under the Indian Succession Act is competent to transfer.

6. Hindu widow, a Member of a joint family and the Karta of a joint family, the Trustees of Hindu Religious Endowments.

7. The last two having their *power* and *necessity*.

§ TRANSFERABLE PROPERTY

1. The person whether he is a full owner or limited owner, the subject-matter must be transferable property.

2. What is transferable property ?

(i) Section 6 says—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law. Every kind of property is transferable unless its transfer is prohibited by Law.

(ii) The exceptions fall under two heads: (a) Merely personal rights cannot be transferred.

(b) An interest in property restricted in its enjoyment to the owner personally cannot be transferred.

3. This shows that there may be a mortgage of movable property. The T. P. Act does not deal with it because the contract deals with it as a pledge. It does not prohibit.

§ THE CONTENTS OF A MORTGAGE-DEED

It is desirable that the mortgage-deed should specify certain particulars.

1. The debt or engagement, which is the subject-matter of the security, should be specified in the deed, otherwise the mortgagor may substitute one debt for another.

2. The time for the payment or performance must be specified in the deed. A stipulation that whole will be payable on payment of instalment

3. The deed should also contain a covenant to pay because there are various kinds of mortgages in which no debt is implied.

4. The property which is given in mortgage should be sufficiently described. It is true, extrinsic evidence is always admissible for the purpose of identifying any property, where the description is either indefinite or even actually misleading.

Q.—Whether a mortgage can be created on a person's property, if such property is not specifically described ? Whether a general mortgage is valid ?

Q.—Whether a general pledge of all the property that the debtor then has, without any further distinction, can create a mortgage under our Law.

1. Distinction must be made between an instrument which contains sufficiently apt words to create a security and the one in which the debtor merely agrees that, if the money is not repaid, the obligee would be at liberty to recover the debt from the whole of the debtor's property.

In the latter case, if they *stand alone*, merely give the obligee the ordinary right of a creditor to levy execution on the property of his debtor and do not create any pledge.

Supposing the case to fall under the first head, is such hypothecation good to create a mortgage.

In India, the validity of such securities has been questioned on the ground that a general hypothecation is too indefinite to be acted upon.

(1) It is said that such hypothecations sin against the canon that a contract form must be definite and reliance is placed upon Section 29 of the Contract Act and Section 93 of the Evidence Act.

(2) Vagueness is a misleading term. It may mean (1) either that the language is so indistinct that it cannot be understood or (2) that the property to which it relates is not specified in the contract.

(3) Indefiniteness is, however, frequently confounded with what has been called wideness.

The subject-matter of a contract may be *wide and yet definite*. On the other hand it may be narrow and yet indefinite.

If a man says " I mortgage all my landed property ", it is wide but definite.

If a man, who has several houses, says ' I mortgage one of my houses ', the description is not wide but is still indefinite.

(4) The word ' specific ' in the T. P. Act is used to distinguish it from general and unless the property is specified in the deed, there can be no mortgage in Law.

(5) The property must be specified although the Law does not say that it must be specified in any particular way.

THE RIGHTS AND LIABILITIES OF THE MORTGAGE INTRODUCTION

1. The property which is the subject-matter of the mortgage is subject to the rights of the mortgagor and the mortgagee.

2. There are two questions to be considered— (i) What are the rights of the mortgagor and mortgagee ? (ii) What is the *nature* of those rights ?

§ What is the nature of the rights

1. The English Law divides :—the interests of the mortgagor is spoken of as an equitable estate, while the interests of the mortgagee is spoken of as a legal estate. The Indian Law does not recognise this distinction between legal and equitable estate.

(1872) 1. A. Supp. 47 (71). 30 1. A. 238.

2. Even under the Trust Act this distinction is not recognised. *581. A. 279.*

3. Both have legal rights—there is nothing equitable as opposed to legal.

II. Under the English Law mortgagee is owner while the mortgagor has a bare right of reconveyance.

1. Under the Indian Law it is just the reverse. The mortgagor is the owner and the mortgagee has only a right in re *abena*.

Rights of the Mortgagor

1. The Rights of the mortgagor fall into three divisions—

I. The Right to redeem.

- II. The Right to manage the property.
- III. The Right to obtain re-transfer.

§ Right to redeem Section 60

1. The right to redeem entitles the mortgagor to require the mortgagee to do three things— (i) To deliver to the mortgagor the mortgage-deed. (ii) To deliver possession if the mortgagee is in possession. (iii) To have executed and registered an acknowledgement in writing that the right (is redeemed)*

2. This right to redeem he can exercise on the following conditions:—

- (i) On payment or tender of the mortgage money.
- (ii) At any time *after* the principal money has become *due*.
- (iii) If the right to redeem is not extinguished by act of parties or by decree of a Court.
- (iv) If the mortgagor is prepared to redeem the whole.

1. RIGHT TO REDEEM

1. The section is not prefaced by any such words as in the absence of a contract to the contrary.

2. The right of redemption is therefore a statutory right which cannot be fettered by any condition which impedes or prevents redemption.

491. A. 60. 3. Any such condition is void as a clog on redemption.

II. CLOG ON REDEMPTION—Any provision inserted in the mortgage transaction to prevent redemption by a mortgagor is void:

(1) The principle underlying the rule against clog is that, mortgage is a conveyance as a security for the payment of a debt. Nothing ought to prevent a man from getting back his *security*.

(2) There is a difference between *sale and security*. If sale, there is no right to get back property. If security, there is a right to get back property.

(3) This right cannot be taken away by a contract. If it does, it will be treated as a clog and will not be enforced.

III. INSTANCES OF CLOG ON REDEMPTION

I. The following clauses are clogs on Redemption :—

- (1) Redeem during the life of the mortgagor.
- (2) Redeem with his own money—not from any other person.
- (3) Redeem by payment on due debt or the mortgage will become sale.
- (4) Redeem on condition that mortgagor shall grant permanent lease to the mortgagee.

II. The following clauses are not deemed to be clogs on Redemption:—

- (1) Not to redeem unless prior mortgages are redeemed.
- (2) Not to redeem an usufructuary mortgage until after the expiry of 15 years.
- (3) Postponement of the right to take possession after redemption for a reasonable and necessary period.

III. No hard and fast rule as to what is a clog and what is not :—

(1) The mere fact that the terms of a mortgage are hard, does not make the clause a clog.

(2) The test is whether it hampers the mortgagor in the exercise of his right to redeem in such a way as to place the right to redeem beyond his reach.

(3) If the clause is a clog, then it will not be enforced, even though it may be contained in a consent decree. The right to redeem cannot be said to have been waived by consent

IV. The doctrine of clog on redemption relates only to the dealings which take place between the parties to the mortgage at *the time* when the contract of mortgage has been entered into. It does not apply to a contract made subsequently with each other.

1. That means that parties are not free at the time when the contract of mortgage is made to take away the right of the mortgagor to redeem.

2. But they are at liberty subsequently to alter the terms of the contract of mortgage and any clause which fetters the right to redeem will not be treated as a clog.

V. *Due.*

1. Must be distinguished from payable. Money may be payable but not due.

2. Due = demand able.

3. If it is not paid on due date, the right to redemption is not lost. Mortgage remains a mortgage—only it can be exercised.

VI. Payment.

(i) Payment must be to *all* if there are more than one mortgagee. (ii) Mode of payment—legal tender or any other medium acceptable to the creditor. (iii) Place of payment—(Page left blank in Ms—ed.)

Redemption and Improvements Section 63 A.

1. The mortgagor on redemption is entitled to improvements in the absence of a contract to the contrary.

2. The mortgagor shall be liable to pay the cost of improvements if the improvement was— (i) necessary to preserve the property from destination. (ii) necessary to prevent security from being insufficient. (iii) made in compliance with lawful order of a public authority.

3. This also is subject to a contract to the contrary.

4. Section 63 A lays down the general rule that ordinarily a mortgagee is not at liberty to effect improvements and charge the mortgagor therewith. The object of the law is to prevent a mortgagee from laying out large sums of money and thereby increasing his debt to such an extent as to cripple the power of redemption. The mortgagee cannot be allowed to make redemption impossible by making improvements—This is called improving a mortgagor out of his estate.

5. The mere *consent* of the mortgagor to improvements is not enough to

make him liable, unless it amounts to a promise to reimburse.

Right of Redemption and the benefit of the renewal of a lease

Section 64

The renewal of a lease is a kind of an accession to the original interest of the mortgagor.

1. If the mortgagee obtains a renewal of the lease, the mortgagor is entitled to the benefit of the renewed lease on redemption.

2. This is subject to a contract to the contrary.

Right of the Mortgagor to manage *Section 66*

1. As long as the mortgagor remains in possession, he is at liberty to exercise the ordinary rights of property and to receive the rents and profits without accounting for them.

2. Question is whether the mortgagor is liable for waste ?

3. This is a Section which deals with the doctrine of waste. Waste is either voluntary or permissive. *Voluntary waste* implies the doing of some act which tends to the destruction of the premises, as by pulling down houses, or removing fixtures ; or to the changing of their nature as the conversion of pasture land into arable or pulling down buildings.

Permissive Waste implies an omission whereby damage result to the premises, where for instance houses are suffered to fall into decay.

To constitute voluntary waste by destruction of the premises, the destruction must be wilful or negligent; it is not waste if the premises are destroyed in the course of reasonable user and any user is reasonable if it is for the purposes for which it is intended to be used, and if the mode and extent of the user is apparently proper, having regard to the nature of the property and what the tenant knows of it.

4. According to Section 66 the mortgagor is not liable for permissive waste. He is liable for voluntary waste which renders the security insufficient.

5. A security is insufficient if the value is less than 1/3 of the money due and less than 1/2 if the security is buildings.

For Section 65 A.—Please see page No. 523

Liabilities of the mortgagor

Section 65.

1. The liabilities consists of certain statutory covenants.

2. They are warranties for the breach of which the mortgagor is liable.

I. GENERALLY— (a) *Covenant for title.*

(i) There is a title in the mortgagor in the interest transferred. (ii) That he had the right to transfer. *Substituted Security*

Where the owner of an undivided share in a joint and undivided estate mortgages his undivided share, the person who takes the security i.e. the mortgagee takes it subject to the right of these co-sharers to enforce a partition and thereby convert what is an undivided share of the whole into a

defined portion held in severally—*II. A. 106*. After partition the security will be the separate share allotted in place of the undivided share. Proceed against the share allotted and not against share originally mortgaged.

* * *

(a) *Covenant to deferred title.*

(b) *Covenant to pay public dues—if the mortgagee is not in possession.*

(c) *Covenant to pay prior Encumbrance (debt) on its being due.*

II. WHEN THE MORTGAGED PROPERTY IS LEASEHOLD.

(i) Covenant that all conditions have been performed down to the commencement of the mortgage.

(ii) Covenant to pay rent reserved by the lease if the mortgagee is not in possession.

(iii) Covenant to perform all the conditions if the lease is renewed.

These covenants are not personal covenants. They run with the mortgaged property and can be availed of by a transferee from the mortgagee.

* * *

Rights of the Mortgagee

1. They fall into two divisions—

(1) Right to realise the mortgage money.

(2) Right to have the security maintained in tact during the continuance of the mortgage.

1. RIGHT TO REALISE THE MORTGAGE MONEY.

1. Under this fall the following rights—

(1) Right to foreclose 67.

(2) Right to sell 67/69.

(3) Right to sue for mortgage money 68.

(4) Right to claim money on sale and acquisition 73.

2. A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is a suit for foreclosure.

NOTE.—

1. Mortgage money does not mean the whole of the mortgage money. If a mortgage is payable by instalments, it is open to the mortgagee to bring a suit for foreclosure for an instalment of the principal and interest. *13 M. L. 1. 2.*

2. In the absence of an express stipulation, a mortgagee is not bound to receive payment by instalments—*24 All. 461.*

3. A suit for interest is maintainable even before the principal money became due unless there is a covenant prohibiting him from doing so.

4. The three rights are not available to every mortgagee.

1. THE RIGHT TO SUE FOR MONEY.

Section 68.

This is available only where the mortgagor binds himself to repay the same.

Question.—When can it be said that a mortgagor *personally* binds himself to pay ?

There are two views on the matter.

(a) A personal covenant is presumed in all mortgages of whatever form. According to this view, the only difference that can arise is that the Court might in the absence of an express covenant, demand more clearly implied covenants than it might require in other case—*13 Lah. 259*.

(b) The other view is that a covenant can arise only where there is an express covenant the words are *binds* himself. This clause would be unnecessary if personal covenant was implied in all cases.

By definition

Section 58.

1. The mortgagor in a simple mortgage *binds* himself to repay the money.
2. In a mortgage by conditional sale, he says that " if he pays he will recover his property ".
3. In a usufructuary mortgage he does not even make this qualified covenant. It is therefore clear that a mortgagor can sue for a money decree in the case of a simple mortgage but not in the case of other kinds of mortgages unless there is an express covenant to that effect.

Exceptions.

The mortgagor can sue for a money decree from the mortgagor. But he cannot sue for a money decree from a transferee from the mortgagor or from his legal representative.—

Other cases in which he can sue for a money decree.

Generally a mortgagee can sue for a money decree when there is a personal covenant by the mortgagor to pay.

2. There are cases where a mortgagee can sue although there is no personal covenant to pay—

Section 68.

(i) Where by accidental causes, not due to the act of either party such as fire, flood or *vis major* the property is destroyed, wholly or partly, or is rendered insufficient and the mortgagor on being given an opportunity fails to give further security.

(ii) Where the mortgagee is deprived of the whole or part of his security by the wrongful conduct of the mortgagor.

(iii) Where the mortgagee being entitled to possession, the mortgagor fails to deliver possession or fails to secure the mortgagee in his possession.

Right to sell 1.

This right belongs only to—

- (i) Simple mortgagee.
- (ii) English mortgagee.
- (iii) (iii) Equitable mortgagee.

2. They cannot sue to obtain possession. They can only sue for sale. If the Court erroneously gives him possession, that possession does not amount to foreclosure and the mortgagor can subsequently redeem the mortgage.

19 *Mad.* 249 (252-53) P. C.

CONDITIONS FOR THE EXERCISE OF THE RIGHT OF SALE AND FORECLOSURE.

1. After the mortgage-money has become due and before decree for redemption is made.

2. Suit must be for the whole of the mortgage-money. There cannot be a suit for the realisation of a part of the mortgage-money by sale or foreclosure of a part of the mortgage property.

Exception.—If there is a severance of the interests of the mortgagee with the consent of the mortgagor, a suit for a part may be brought by the mortgagee.

Section 67 A.

3. A mortgagee who holds *many* mortgages against the same mortgagor must bring *one* suit on those mortgages in respect of which—

(i) A right to sue has accrued to him and

(ii) In respect of which he has a right to obtain the same kind of decree.

Section 65 A.

4. If the mortgagor could not only manage the property but, if he is *lawfully* in possession of the mortgaged property, he shall have the power to make leases thereof which would be binding upon the mortgagee.

5. After the mortgage this power of the mortgagor to deal with the property is limited. He has not anything like general authority.

6. The power to lease is circumscribed by certain condition.

(i) He may lease it in accordance with local law, custom or usage.

(ii) Every lease shall reserve lest rent can reasonably be obtained—rent shall not be paid in advance.

(iii) The lease must not contain a covenant for renewal.

(iv) Lease shall take effect from a date not later than 6 months from the date on which it was made.

(v) In the case of a lease of a building, the duration of the lease shall not exceed three years.

7. The general power of the lease is subject to a contract to the contrary. The other provisions are subject to variations.

Right to foreclose. This right belongs to—

(1) Mortgagee by conditional sale.

(2) Mortgagee by anomalous mortgage by the terms of which he is entitled to foreclose.

Mortgagees who can neither sue for sale nor for foreclosure.

(1) Usufructuary mortgagee.

(2) Mortgagee of a Railway and canal or other work in the maintenance of which the public are interested. *Case of a mortgagor who may become a trustee or executor of the mortgagee or the mortgagee may become a trustee or executor of the mortgagor.*

Can such a mortgagor or mortgagee foreclose sale ?

Sub-clause (b) of Section 67 provides for the case of a mortgagor who has become a trustee for the mortgagee. According to this clause a mortgagor trustee, who may sue for sale, is not allowed to foreclose.

In the other case the foreclosure is equally prohibited according to English practice on the principle that it is the duty of the trustee to consult the interests of the mortgagor and that it is for the mortgagor's interests that a sale and not foreclosure, should take place.

EXERCISE OF THE POWER OF SALE WITHOUT THE INTERVENTION OF THE COURT

1. As a rule, a mortgagee can bring the property to sale only through the Court.

2. Section 69 provides exceptions to this rule.

(i) Where the mortgage is an English mortgage and neither the mortgagor or the mortgagee is a Hindu, Mohammedan or Buddhist or a member of a community notified in Gazette.

(ii) Where a power of sale is expressly given by the deed and the mortgagee is the S. of S.

(iii) Where a power of sale is expressly given by the deed and the property or any part of it was on the day of the execution of the deed situated in the towns of Bombay, etc

Section 69 A.

3. The mortgagee who has the *power* (as distinguished from the right) to sell without the intervention of the Court is also entitled to appoint a receiver by writing signed by him or on his behalf.

4. The exercise of this power of sale or power of appointing a receiver is to notice to the mortgagor.

5. The notice must be in writing requiring payment of the principal money and default for three months.

Section 73. I Mortgagee's Right to proceeds of sale

1. When property is sold for failure to pay arrears of revenue or other public charges and such failure is not due to default by the mortgagee, the mortgagee is entitled to claim the balance of the sale proceeds.

2. Similarly if he mortgage property is compulsorily acquired, the mortgagee shall be entitled to claim payment of the mortgage money out of the amount due to the mortgagor as compensation.

3. His claim shall prevail against all except those of the prior encumbrances.

4. The claim may be enforced although mortgage money has not become due.

II. Rights of the mortgagee to the maintenance of the Security in tact during the continuance of the mortgage.

1. Right to accession—Section 70.
- II. Right to renewed lease—Section 71.
- III. Right to preserve property—Section 72.

Section 70

1. § Right to accession.

1. The mortgagee is entitled to the accession for the purpose of his security *if* the accession is made after the date of the mortgage. *29 Cal. 803.* Where two mortgages were executed on a land on which there was a house and thereafter two new houses were built by the mortgagor on the land held that they were accessions on which a mortgagor could rely for security.

If the house was built *before* mortgage, he could not.

He could not if it was built after decree although the section does not say so.

This is subject to a contract to the contrary. *Section 71.*

2. § Right to the benefit of a renewed lease.

He will be entitled to the benefit of the new lease for the purposes of his security.

This is subject to a contract to the contrary. *Section 72.*

3. § Right to preserve the property.

1. A mortgagee may spend such money as is necessary—

- (i) for the preservation of the mortgage property from destruction, forfeiture or sale.
- (ii) for supporting the mortgagor's title to the property.
- (iii) for making his own title thereto good against the mortgagor.
- (iv) when the mortgaged property is a renewable leasehold, for the renewal of the lease.
- (v) he may insure if the property is insurable and add the cost to the principal money.

Right of mortgage to Priority

I. PRIORITY BY TIME.

1. The general rule regarding priority in the matter of transfers of interests in immovable property is laid down in Section 48 of the T. P. Act.

2. The same rule applies to questions in regard to mortgages so that priority of mortgages in India depends upon the respective dates of their creation, the earlier in date having precedence over the latter—*56Cal.868.*

3. Section 78 is an exception to this rule. It lays down that the Court would postpone the prior mortgagee to the subsequent mortgagee where the prior mortgagee has, through fraud, misrepresentation or gross neglect, induced the subsequent mortgagee to advance money on the security of the mortgaged property.

Misrepresentation:

1. Is defined in Section 18 of the Indian Contract Act.

2. It does not necessarily mean fraudulent misrepresentation.

Fraud

Gross Negligence.

There is a difference between English and Indian Law. According to English Law gross negligence means negligence *amounting to fraud*.

According to Indian Law gross negligence is different from fraud.

II. PRIORITY BY PAYMENT.

Q.—Can a mortgagee acquire priority over an intermediate mortgagee by buying the rights of an earlier mortgagee ?

Section 93

1. A mortgagee cannot acquire priority over an intermediate mortgagee by paying off a prior mortgagee whether he pays with or without knowledge of the intermediate mortgagee.

2. A mortgagee making a subsequent advance to the mortgagor, shall not acquire priority in respect of such subsequent advance over an intermediate mortgagee, whether he makes the advance with or without the knowledge of the intermediate mortgagee.

Section 79

This Section forms an exception to the second rule laid down in Section 93.

Under Section 79. A subsequent mortgagee having notice of the prior mortgage is postponed in respect of any subsequent advance if the prior mortgage is made to secure future advances and the subsequent advance does not exceed the maximum.

Right of Mortgagee to Marshalling

Section 81.

Section 82.

Question of Marshalling

1. This arises when two or more properties are mortgaged to two *different* mortgagees in such a way that both properties are subject to the mortgage rights of one mortgagee while only one is subject to the mortgage rights of the other.

Illus.

A is the owner of two estates—Whiteacre and Blackacre. A mortgages Whiteacre and Blackacre to B and thereafter mortgages Blackacre to C.

The position that arises is this. B has a mortgage over Whiteacre as well as Blackacre. C has a mortgage over Blackacre only. From the standpoint of realizing the mortgage money B has a right to sell both Whiteacre as well as Blackacre. While C has a right to sell only Blackacre.

If B were allowed to exercise his rights as a mortgagee it would result in prejudice to the rights of C.

In order to protect C equity invented the doctrine of marshalling—under this equity compelled B to proceed first against that property which is not the

subject-matter of security for the debt of another mortgagee. This is embodied in Section 81.

Note.—1. It is unnecessary for the mortgagee to have had no notice of the former mortgage in order that he may be able to claim the benefit of marshalling.

CHAPTER 8 LAW OF EVIDENCE

LAW OF EVIDENCE

1. § Meaning of the word Evidence

Like most of the words used in the statutes the word has a popular as well as technical meaning.

Popular meaning

Evidence in its ordinary sense signifies that which makes apparent the truth of the matter in question.

4 Mad. 393.

Technical meaning

The word however is used in the Evidence Act in a technical sense.

Section 3 defines the sense in which the word evidence is used in the Evidence Act. According to that Section

Evidence means and includes :

- (1) All Statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry;
- (2) All documents produced for the inspection of the Court. This definition of the term ' Evidence ' is incomplete.

The depositions of witnesses and documents which only are included in the term evidence as defined by the section are the two principal means by which the materials upon which the judge has to adjudicate are brought before him. The examination of witnesses is generally indispensable and by means of it, all facts except the contents of documents may be proved (Sec. 59). For the proof a document as a statement made by the person by whom it purports or is alleged to have been made, oral Evidence is required. (Sec. 67-73).

As compared with the definition of the word " Proved " this definition of the word " Evidence " is narrow. According to the definition of the word " Proved ", " A fact is said to be proved when, after considering **the matters before it**, the Court believes it to exist....."

The Expression **matters before it** is much wider than what the word **Evidence** is said to include.

Evidence does not include :

- (1) Statement made by the parties and accused persons.
- (2) demeanour of witnesses.
- (3) Results of local inspection.
- (4) Facts judicially noted.

(5) Any real and personal property, the inspection of which may be material in determining the question at issue such as weapons, tools or stolen property.

(6) Questions put to the accused by the Magistrate and the answers.

But all these are included in the expression " matters before it ".

The point is that the definition of evidence is strictly applicable to matters dealt with in the Evidence Act. It does not apply to evidence as dealt with by other Acts.

2. § Genesis of the Indian Evidence Act.

1. The Law of Evidence in India is contained in Act I of 1872.

§ Diversity of the Law of Evidence

2. There were two sets of Courts in British India ever since 1773 when the Regulating Act was passed by Parliament with a view to control the administration by the East India Company of its Indian possessions. There were the Supreme Courts established by Royal Charter in the Presidency Towns of Bombay, Madras and Calcutta. In the Muffassils, there were Courts established by the East India Company, Civil and Criminal. The rules of Evidence followed by the Supreme Courts were different from the rules of evidence followed by the mufassil Courts.

3. The Supreme Courts followed such of the rules of evidence as were contained in the Common and Statute Law which prevailed in England before 1726 and which were introduced by the Charter of that year in India. Some others were rules to be found in subsequent statutes of Parliament expressly extended to India; while others again, had no greater authority than that of use and custom.

4. For the Courts outside the Presidency Towns and not established by the Royal Charter no complete rules of Evidence were ever laid down or introduced by authority. Regulations made between 1793 and 1834 contained a few rules. Other were derived from a vague **customary law of evidence** partly drawn from the Hedya and **Mohomedan Law Officers**. Others were drawn from English text books.

§ Efforts towards Uniformity:

5. The first Act of the Governor General in Council which dealt with evidence, strictly called, was **Act X of 1835** which applied to all the Courts in British India and dealt with the proof of the Acts of the Governor General in Council.

This was followed by **eleven enactments passed at intervals** during the next twenty years, which effected various small amendments of the law of evidence and applied to the Courts in India several of the reforms in the law of Evidence made in England.

In 1855, Act II of 1855 was passed for the further improvement of the law of evidence which contained many provisions applicable to all the Courts in British India.

6. Notwithstanding this attempt at uniformity there continued to be a great deal of disparity between the rules of Evidence applicable in the Presidency Towns and those applicable in the Muffassil. This disparity continued to be the subject of frequent judicial comment.

To remedy this state of affairs. Act of 1872 was passed.

§ Construction of the Act :

1. An Act may be (1) to *consolidate* or (2) to *amend* or (3) to *consolidate and to amend* or it may be to *define* i. e. to codify. The construction of an Act would differ according as it is a consolidating Act or a Codifying Act.

2. **Construction of a Codifying Act :** The rule of construction in regard to a Codifying Act is laid down in (1891) A. C. 107 (120).

Bank of England vs. Vagliano .

Lord Halsbury observed:

P. 120.

" I am wholly unable to adopt the view that where a statute is expressly said to Codify the law, you are at liberty to go outside the Code, so created, because before the existence of that code another law prevailed. "

Lord Harschell observed:

P. 144

" The proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning, **uninfluenced by the considerations derived from the previous state of the law** and not to start with enquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words will bear an interpretation in conformity with this view. "

3. The object of codification of a particular branch of the law is that, on any point specifically dealt with by it, such law should be sought, for in the codified enactment, and is ascertained by interpreting the language used.

4. Construction of a Consolidating Act: The rule of Construction in regard to a Consolidating Act is laid down in (1894) 2 Ch. 557.

Shitty J. (P. 561) observed after referring to the rule of construction laid down in *Bank of England vs. Vagliano* in regard to a codifying Act. in Lord Halsbury

"..... But I have here to deal, not with an Act of Parliament codifying the law, but with an Act to amend and to consolidate the law and therefore it is I say these observations (of lord Halsbury) do not apply and I think it is legitimate in the interpretation of the section in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature. "

5. The object of consolidation with or without amendment is merely to assemble together the scattered parts of the Existing law. It is merely a re-enactment of the old law. It is not a new enactment of the law. Prima facie the

same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted.

6. The Indian Evidence Act is as stated in the Preamble an Act to *Consolidate, define and amend* the law of evidence.

It is not a statute which merely consolidates and amends the evidence i. e. it codifies the law of evidence. Its constructions will be governed by the rule laid down in *Bank of England vs. Vagliano* and not by the rule laid down in it.

§ Scope and Extent of the Act

1. The scope of the Act is defined in *Section 2*. Under section 2 the law of evidence is contained :

(i) In the Evidence Act and

(ii) In other Acts or statutes which make specific provision on matters of evidence and which are not expressly repealed.

This Section in effect prohibits the employment of any kind of evidence not contained in the Act or any other statute or Regulation not expressly repealed.

Section 2:—The following laws shall be repealed.

(1) All rules of Evidence not contained in any Statute Act or Regulation in force.

(2) All such rules contained in Regulation as have acquired the force of law under Section 25 of the Indian Councils Act, 1861.

(3) Enactments mentioned in the Schedule.

2. The Evidence Act and other Acts relating to Evidence—

(1) The Evidence Act is a separate statute dealing with an important branch of law and its provisions are independent of the rules of procedure contained in the Criminal Procedure Code and must have full scope unless it is clearly proved that they have been repealed or altered by another statute.

7 Lah. 84.

§ Application of the Act

Section I prescribes the application of the Act

(1) *Territorial Application*

It extends to the whole of British India and therefore applies to the Scheduled Districts.

It extends to places where it has been declared to be in force.

(2) *Application to Tribunals* It applies to all judicial proceedings **in or before any Court.**

(i) WHAT IS MEANT BY A JUDICIAL PROCEEDINGS ? There is no definition.

An inquiry is judicial if the object of it is to determine a jural relation between one person and another or a group of persons or between him and the Community generally ; but even a Judge acting without such an object in view is not acting judicially.

12 Bom. 10 M. 1. A. 340.

An inquiry under section 32 of the Bombay Land Revenue Code is not a

Judicial proceeding.

22 Bom. 936.

2. The Act applies to all judicial proceedings i. e. to **civil** as well as **criminal**.

3. The Act speaks of proceedings not merely suits and trials. Proceedings is a wider term. Inquiry under *Section 107* or *144* of the Criminal Procedure Code is not a trial but is a proceeding. Similarly execution of a decree is not a suit but is a proceeding. Consequently the Act applies to proceeds other than trials and suits.

(ii) **What is a Court**

1. Section 3 which is an interpretation clause speaks of the sense in which the word Court is used in the Act. According to this Section—

" Court includes all Judges and Magistrates, and all persons, except Arbitrators, legally authorised to take evidence. "

2. This Section does not define what is a Court. It merely says what is to be included in the meaning of the word Court i. e. what functionaries are to be treated as a Court.

3. Where in an interpretation clause it is stated a term includes this and that, the meaning is that the term retains its ordinary meaning and the clause enlarges the meaning of the term and makes it include matters which the ordinary meaning would not include.

23 A. L. J. 845.

4. The Court means all persons except Arbitrators who are legally authorised to take evidence. That being so the word Court is not to be confined to persons presiding over a Civil tribunal or a Criminal tribunal.

A Registrar holding an enquiry and taking evidence under the Registration Act is a Court.

15 Mad. 138.

A Commissioner appointed under order XXVI R. 1-10 of the Civil Procedure Code and under Section 503-508 of the Criminal Procedure Code is a person legally entitled to take evidence and as such he is a court.

5. Judges.

No definition of the word " Judges " is given in this Act. Section 2 (8) of the Civil Procedure Code defines the word ' Judge ' to mean the presiding officer of a Civil Court.

Section 19 of the Indian Penal Code, also gives definition of the word Judge. According to this definition a Judge is a person designated as a Judge also a person who is empowered by law to give, in any legal proceeding, civil or criminal a definitive judgement.

6. Magistrates.

No definition of this term is given in the Act. The General Clauses Act (X of 1897) lays down the following definition of the term:—

Magistrate shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force.

7. The peculiarities of these definitions is that they are neither uniform nor are they co-extensive.

(i) The basis of the definition of Judge in the Civil Procedure Code is the presidency of the officer.

The basis of the definition of the same word under the Indian Penal Code is his authority to give the Judgement. The basis of the definition under the evidence is the power to take evidence.

(ii) The definition of a Judge under the Criminal Procedure Code would not include a Magistrate. But the definition in the Indian Penal Code would include a Magistrate.

(iii) The Evidence Act would not include Arbitrator either Judges or Magistrates. But the definition of ' Judge ' in the Indian Penal Code would include Judges, Magistrates as well as Arbitrators.

The conclusion is that the definition of the word Court in the Evidence Act is framed only for the purpose of the Act. itself and should not be extended beyond its legitimate scope.

§ Proceedings to which the Evidence Act does not apply

1. The Act does not apply to :—

- (i) Judicial proceedings in or before a Court Martial convened under the Army Act or Air Force Act.
- (ii) Affidavits presented to any Court or officer.
- (iii) Proceedings before an Arbitrator.

Proceedings before a Courts Martial

1. The Act does apply to the proceedings of a Courts Martial under the Indian Army Act i. e., it applies to Native **Courts Martial. Act VIII of 1911.**

2. The Act also applies to all proceedings before the Indian Marine Courts.

Act XIV of 1887 s. 68.

Act V of 1898.

Act XVII of 1898.

Act I of 1899.

3. The Act does not apply to the proceedings of a Court Martial convened under the British Army or Air Force Act.

Questions relating to evidence are determined by *Ax loci contractus*, but by the law of the Country where the question arises where the remedy is sought to be enforced and where the court sits to enforce it.

The law of evidence which governs the proceedings before a court is the **Ax fori.**

This provision of the Evidence Act is an exception to this general principle.

II. Affidavits.

1. Ordinarily the evidence of witnesses shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge (Order 18 R. 1. C1.P. C.).

2. An Affidavit is a evidence contained in a statement or a declaration in writing on oath or affirmation before a person having authority to administer oath or affirmation.

3. Matters relating to affidavit are regulated by the Civil Procedure Code.

4. **Affidavit is evidence not taken before the Court and not subjected to cross examination.**

5. The safeguards for truth in affidavits are two :

(i) Provisions for the production of the witness for cross Examination.

(ii) Provisions of the Penal Law relating to giving of false evidence.

III. Proceedings of the Arbitrator.

He gives rough and ready justice and cannot be bound by the technicalities of the Law of Evidence.

§ Proper approach to the study of the Evidence Act.

1. The Indian Evidence Act divides the subject matter of evidence into three parts :

Part I deals with Relevancy of facts—what facts can be proved.

Part II deals with Proof.

Part III deals with Production and Effect of Evidence— Burden of Proof.

2. This may be a logical order. It may be a scientific order. But this certainly does not appear to be a natural order, natural from the point of view of the litigant.

3. The rules of Procedure regulate the general conduct of litigation; the rules of pleading help to ascertain for the guidance of parties and the Court, the material facts in issue in each particular case. Then arises the question of proof i. e. the Establishment of the facts in issue by proper legal means to the satisfaction of the Court.

4. The first question which faces the litigant is **who must prove the issue ?** The questions how and by what sort of evidence he can prove them are secondary questions to him. We must therefore begin with **Burden of Proof.**

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